

1 JOHN C. KLOOSTERMAN, Bar No. 182625
2 LAURA E. HAYWARD, Bar No. 204014
3 LITTLER MENDELSON
4 A Professional Corporation
5 650 California Street, 20th Floor
6 San Francisco, CA 94108.2693
7 Telephone: 415.433.1940

8 Attorneys for Defendants
9 24 HOUR FITNESS USA, INC. AND SPORT AND
10 FITNESS CLUBS OF AMERICA

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 GABE BEAUPERTHUY, et. al.,

15 Plaintiffs,

16 v.

17 24 HOUR FITNESS USA, INC. a
18 California corporation dba 24 HOUR
19 FITNESS; SPORT AND FITNESS
20 CLUBS OF AMERICA, INC., a California
21 corporation dba 24 HOUR FITNESS,

22 Defendants.

Case No. C 06 0715 SC

**NOTICE OF MOTION, MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO STRIKE
PLAINTIFFS' DECLARATIONS**

Date: January 21, 2011

Time: 10:00 a.m.

Judge: Hon. Samuel Conti

NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 21, 2011, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 1, 17th Floor of the United States District Court of the Northern District of California, located at 450 Golden Gate Ave., San Francisco, California 94102, before the Honorable Samuel Conti, Defendants 24 Hour Fitness USA, Inc. and Sport and Fitness Clubs of America ("Defendants") will, and hereby do, move for an Order to Granting Defendants' Motion To Strike Plaintiffs' Declarations, specifically, all declarations filed by Plaintiffs in support of their oppositions to Defendants' motions to decertify (Docket # 387-401).

This motion is made on the ground that the declarations of individuals previously deposed contradict the declarants' prior deposition testimony and prior declaration testimony. Thus, all of the declarations are suspect and without credibility and should be stricken from the record.

This Motion is based on this Notice, the Memorandum of Points and Authorities in support thereof, the accompanying declarations and exhibits, the papers and pleadings on file in this case, and all other evidence and argument as may be presented at the hearing on the motion.

STATEMENT OF THE ISSUES

Should the declarations filed by Plaintiffs in support of their opposition to Defendants' decertification motions (Docket #387-401) be stricken in their entirety for lack of credibility?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

All of the declarations filed by Plaintiffs in support of their opposition brief should be stricken in their entirety. The declarations of individuals previously deposed are inconsistent with the declarants' deposition testimony and prior declaration testimony. As such, all of the declarations are suspect and entitled to no weight whatsoever. All of those declarations should be stricken from the record.

II. STATEMENT OF FACTS

Plaintiffs filed a motion for collective certification of manager and personal trainer subclasses, supported in part by declarations of putative class members including but not limited to Kelly Fennelly (also known as Kelly Hillenbrand) and John Davidsson. (Docket #73, 75.)

During discovery, Defendants deposed the following individuals, as well as others: (1) Gabe Beauperthuy, (2) Clifford Cotton, (3) William Clunn, (4) Natalie Cromartie, (5) Seth Daniels, (6) John Davidsson, (7) Bobby DeSoto, (8) Lawrence Dickerson, (9) Anne Dillon, (10) Toni Fiedler, (11) Tina Flores, (12) Garth Gelker, (13) Adam Grubbs, (14) Victoria Hadipour, (15) Shane Hedani, (16) Cory Hennessey, (17) Kelly Hillenbrand, (18) Michelle Janke, (19) Brent Johnson, (20) David Kaipi, (21) Quinton Kaplan, (22) Belton Lubas, (23) Cindy Magnani, (24) Michael Marino, (25) Richard McGrath, (26) Megan Olsen, (27) Louis Ortiz, (28) Joeleen Palmeri, (29) Carmen Pieske, (30) Alfred Ra-Oof, (31) Patricia Rangasajo, (32) Matthew Reiter, (33) Bonnie Rinta, (34) Chad Ruf, (35) Dennis Sciacca, (36) Harley Spencer, (37) Lawrence Srubas, (38) Maika Symmonds, (39) Connie Wusterbarth, and (40) Stephanie Yamada. Plaintiffs' counsel, as well as Defendants' counsel, had opportunity to ask questions of those deponents and often did. *See e.g.* Declaration Of John Kloosterman In Support Of Defendants' Motion To Strike (hereinafter "Kloosterman Decl.") Exh. A-C (Deposition of Chad Ruf at 231-241; Deposition of Joeleen Palmieri at 241-147; Deposition of Alfred Ra'Oof at 186-202). Some of those witnesses served erratas to their deposition transcripts. Kloosterman Declaration Exh. D.

After the close of discovery, Defendants filed a Motion To Decertify the Conditional Manager Class and Motion To Decertify The Conditional Personal Trainer Class, both of which relied in part on Plaintiffs' deposition testimony. (Docket # 362, 371).

Plaintiffs opposed Defendants' decertification motions. (Docket #385, 386). With that filing, Plaintiffs submitted the declarations of the forty individuals listed above. As discussed more fully below, those declarants blatantly contradicted their prior sworn deposition testimony. Moreover, at least two individuals contradicted their prior declaration testimony. Examples of those contradictions are set forth in Exhibit A hereto. Because of those inconsistencies, all of the declarations should be stricken from the record as untrustworthy.

III. ARGUMENT

A. All Of Plaintiffs' Declarations Should Be Stricken, Because The Deponents' Declarations Contradict Their Sworn Deposition Testimony.

All of Plaintiffs declarations should be disregarded. Courts routinely reject subsequent conflicting testimony in the summary judgment context. Under the sham affidavit rule, "a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991); *see also Bosinger v. Belden CDT, Inc.*, 358 Fed. Appx. 812, 815 (9th Cir. 2009) ("A party may not create an issue of fact by affidavit contradicting prior deposition testimony"); *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806 (1999) (noting that the lower courts have held "with virtual unanimity that a party cannot create a genuine issue of fact...simply by contradicting his or her own previous sworn statement...without explaining the contradiction or attempting to resolve the disparity").

Similarly, the Ninth Circuit rejects errata changes that conflict with deposition testimony. Rule 30(e), which provides opportunity to review and make changes to a deposition transcript, may be used only for corrective, not contradictory, changes. Fed. R. Civ. Proc. 30(e)(1); *Hambleton Brothers Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217, 1225 (9th Cir. 2005) ("While the language of FRCP 30(e) permits corrections...this permission does not properly include changes offered solely to create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment"); *Lewis v. CCPOA Ben Trust Fund*, 2010 U.S. Dist. LEXIS 95739, *5 (N.D. Cal. 2010) ("In the Ninth Circuit, Rule 30(e) deposition changes are subject to the "sham rule," which precludes a party from manufacturing an issue of fact by submitting errata or an affidavit that contradicts prior deposition testimony"). In *Hambleton*, the Ninth Circuit followed *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 n.5 (10th Cir. 2002), which explained:

[Rule 30(e)] cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.'

Id. (quoting *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992)).

Courts have rejected subsequent contradictory testimony in other contexts. For example, in *Faralli v. Hair Today, Gone Tomorrow*, 2007 U.S. Dist. LEXIS 1977 (N.D. Ohio Jan. 10, 2007) the plaintiff, alleging that the defendant engaged in a coordinated fraudulent marketing campaign, filed a motion for class certification under Rule 23. The defendant claimed that the plaintiff lacked standing and was not a member of the purported class, pointing to the fact that the plaintiff did not testify that she saw or relied on the defendant's ads. *Id.* at *25. The plaintiff submitted a newly executed affidavit wherein she averred that she saw a newspaper ad in which the defendant claimed it could eliminate her unwanted hair. *Id.* at *25-26. The defendant filed a motion to strike the affidavit on the basis that the affidavit directly contradicted her prior testimony, and did not explain why the new averments were not included in the plaintiff's first affidavit. *Id.* at *26-27. The court granted the defendant's motion to strike, finding it was "an unfair attempt to now fill the gap left in her deposition when questioned as to how she first learned of [Hair Today, Gone Tomorrow]." *Id.* at *27.

Also, in *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655 (N.D. Ga. 2001), the plaintiffs, bringing racial discrimination claims, sought class certification under Rule 23. The defendants urged the court to disregard statements in several affidavits submitted by the plaintiffs on the ground that the statements were contradicted by the affiants' deposition testimony. *Id.* at 663. The court noted that several statements in the affidavits were in fact contradicted by the deposition testimony, and that the depositions cast doubt on the accuracy of several other statements contained in the affidavits. Nonetheless, the court held that for purposes of resolving the plaintiffs' motions for class certification, it would not strike the affidavits of the putative class members. *Id.* However, the court also stated: "Where those affidavits are expressly contradicted by deposition testimony without explanation, . . . the deposition testimony will control." *Id.* (emphasis added).

Here, the new declarations conflict with prior deposition testimony. See Exhibit A hereto. For example, Lawrence Srubas testified during deposition that after the time and labor system was implemented, he clocked in when he arrived and clocked out when he left or when his shift was over, and that he was paid for all hours for which he was clocked in. He claims in his

1 declaration that he really meant that he sometimes kept working after he clocked out. Specifically,
2 his deposition testimony was:

3 * * *

4 Q. Do you remember when the time-and-labor system came into
5 the club?

6 A. I don't remember that.

7 Q. You were still at Addison?

8 A. Yes.

9 Q. How did it change when time and labor was implemented?

10 A. We would clock in when we got there, we would clock out when
11 we left, or when we were finished with a particular task with our --
12 with our shift.

13 Q. And you were paid for all the hours that you were clocked in?

14 A. Yes.

15 Kloosterman Declaration Exh. E (Srubas Depo. 69:19-70:15) (emphasis added). He attempts to
16 evade this concession in his declaration by stating:

17 In 24 Hour's Decertification Motion re Trainers (17:2-4), 24 Hour
18 cites to my testimony at 69:19-70:15, claiming that I said that after
19 time and labor was implemented, I was paid for all non-session time.
20 Yet, in the cited testimony, I explained that we would clock out when
21 we left or when our shift was over. I never said that I had to stop
22 working off-the-clock or that all of my non-session work was
23 accurately recorded. In fact, I am trying to explain in the testimony
24 that it was more tied to when we finished a specific task or our shift
25 was over. Sometimes that coincided with when we left the club. But,
26 for the duration of my employment, the FIT Hours Budget and dual
27 time-keeping system remained in place.

28 Srubas Decl. ¶40 (Docket #400) (emphasis added).

Seth Daniels (also known as Seth Bregman) testified in deposition that he estimated
his highest earnings at \$160,000. Then, in his declaration, he attempts to downplay this concession:

* * *

Q. As a general manager at 24 Hour Fitness, what was the highest
amount of money you earned in a year?

A. I can't really recall the highest amount I ever made.

Q. Can you estimate?

1 A. If I was going to estimate, I'd say 160,000.

2 Q. And what was the average amount that you would make in a
3 year as a general manager?

4 A. The years I didn't make 160-, I made around a hundred.

5 Kloosterman Declaration Exh. F (Daniels Depo. at 124:5-17) (emphasis added). Daniels did not
6 change this testimony when he submitted an errata sheet to his deposition transcript. Kloosterman
7 Decl. Exh. D. Instead, Daniels waited until after Defendants filed their decertification motions to
8 contradict his deposition testimony:

9 Decertification Motion re Manag[e]rs 23:20-26: 24 Hour cites to my
10 testimony for the proposition that "Based on deposition testimony
11 payroll records and Plaintiff's damage estimates, we know that some
12 managers earned more than \$100,000 per year. See, e.g., Daniels
13 124:5-17 (in best year as a GM, earned about \$160,000; in average
14 years, earned about \$100,000)". I understand that 24 Hour is citing to
15 this to support the "Highly Compensated" exemption that could
16 potentially [apply] to workers earning over a 100,000 per year on or
17 after August 23, 2005. I am also informed that for managers, the
18 effective claims period ends March 31, 2006 because after that 24
19 Hour reclassified us as non-exempt and began paying us hourly. It is
20 true that I provided that estimate, but 24 Hour's attorneys never asked
21 me when that could be. As I testified in my deposition, my first stint
22 as a GM was from about October 2002 to August 2003 (less than a
23 year). I was then an AGM until about May or 2004. Then, I was a
24 GM from May 2004 until March 2005 (less than a year), at which time
25 I became a Deputy DM until June or July 2005. In June of July 2006,
26 I then became a GM until Spring 2007 (less than a year), which I was
27 then promoted to club Manager. I never actually worked a full year as
28 a GM and I was pretty clear in my deposition that I was providing an
estimate only. I have no recollection if for any 52 week period,
starting and moving forward from August 24, 2003 and ending March
31, 2006, as to whether I or any other club-level manager ever made
\$100,000 or more.

21 Daniels (Bregman) Decl. ¶77 (Docket #389) (emphasis added).

22 Antoinette Fiedler testified in deposition that her number one priority was banking,
23 but then testified in her declaration that her primary duty was to ensure that the club was clean:

24 * * *

25 Q And how many hours a day would you say you spent in your
26 office at Green Valley?

27 A Well, there again, that varied, depending upon the day. We
28 were encouraged not to spend any more time than what we needed to
in our office. You know, there was things -- sometimes if we would
have an OM conference call, which we had every week, they could go

two to three hours, so, of course, you were stuck during that time. Of course, the banking -- that was the No. 1 priority. The banking had to be done in the morning because we had to get it into the banking, so it's the cash. Checks and credit cards went to corporal office, but the cash deposits had to be in usually by eleven o'clock in the morning because your courier came in the afternoon and would pick up the checks, the credit cards, your banking sheet. You had a balance sheet that you had to fill out every day, whatever contracts that the salespeople had sold, you know. That had to go into the courier bag. If the -- the fitness department sold training, that paperwork had to go into the corporate offices, you know, to different areas. If you had something that had to go to a corporate office maybe for billing -- you know, people would sometimes change their method of billing. Maybe they were on one credit card and they would change it to another credit card, or they had a checking account and they changed it to a credit card. Those type of things would go to our main billing area. It depended on -- some days were heavier than others. Sometimes we would have to gather all of the time sheets and put those in, so that could go into the payroll department at the corporate office. We would verify, you know, with our district manager, that, you know -- always -- we always had to check in with them, make sure this paperwork was completed in the courier bag, and, you know, it had to be ready. So it just depended upon the workflow of the day.

Kloosterman Declaration Exh. G (Fiedler Depo. 48:24-50:17) (emphasis added). Fiedler did not change this testimony in her deposition errata. Kloosterman Decl. Exh. D. In her declaration, she testifies:

Operations Manager. Although I held the title of a club-level Operations Manager, my primary duties were non-management duties to assist the operations of the club to meet its primary goal of maximizing sales. My primary duty was to ensure that the club was clean 24 hours a day. Sales cannot be made unless the club is spotless. Over 90% of my duties consisted of routine clerical work, sales (36:17-37:14) and greeting members....

Fiedler Decl. ¶54 (Docket #391) (emphasis added). Other deponents claim to have "later learned" contradictory information, but failed to explain when, how, or from whom they supposedly learned it. See, e.g., Beauperthuy Decl. ¶4 (Docket #387); Cromartie Decl. ¶9 (Docket #389); Grubbs Decl. ¶6 (Docket #393); Symmonds Decl. ¶5 (Docket #400).¹

The new declarations also conflict with declarations that Plaintiffs filed in support of their motion for conditional certification. For example, Kelly Fennelly (Hillenbrand) stated in her December 2006 declaration that she was a Fitness Manager for "years." Declaration of Kelly

¹ EVIDENTIARY OBJECTION: Defendants object to such declaration testimony that they "later learned" the contradictory information to the extent such testimony is hearsay. Fed. R. Evid. 802.

Fennelly In Support Of Plaintiffs' Motion For Facilitated Notice Of FLSA Collective Action (Docket #75) ("From my years as 24 Hour Fitness Manager....") (emphasis added). In her deposition, Fennelly (Hillenbrand) testified that she was a Fitness Manager for "two months max." Kloosterman Decl. Exh. H (Hillenbrand Depo. 74:2-76:1). Also, in her 2006 declaration Fennelly (Hillenbrand) testified that "Operations Managers...were allowed to hire employees at a certain pay rate...." (*Id.* at ¶34), but in her deposition, she testified that she only "screened" applicants and "actually didn't officially hire them...." Kloosterman Decl. Exh. H (Hillenbrand Depo. 128:25-130:25).

John Davidsson stated in his December 2006 declaration that he "recruited and recommended new Trainers." Declaration Of John Davidsson In Support Of Plaintiffs' Motion For Facilitated Notice ¶17 (Docket #390). In his deposition, he backpedaled by offering the following lengthy explanation:

* * *

Q.: On Page 6, Paragraph 15, what did you mean when you stated, "A fitness manager at 24 Hour Fitness is a position of 'lead' personal trainer whose job functions including both supervising other personal trainers and recruiting and training new personal trainers as well as providing training sessions to members, as needed"? What did you mean when you said "recruiting and training new personal trainers"?

A. In the context of 24 Hour Fitness recruiting was limited to who we would suggest take the SeleXpert test. So, for example, someone walks into the facility and says, I want to be a personal trainer. We can certainly always give them that advice, to go to SeleXpert. But if they have no credentials, as I've stated, personal training credentials, that was the very little discretion that we had as far as recruiting. But, I mean, we could send people to SeleXpert.

Q. Okay. And in Paragraph 17, you say, "I also recruited and recommended new trainers. My primary focus and responsibility as a fitness manager was motivating the trainers to meet the revenue goals that were assigned by the company to our individual club." What did you mean when you said, "I also recommended and recruited new trainers"?

A. Same as above, really, in terms of that language of recruiting, because that's all we could do is really recommend they take the test or perhaps not take the test or go out and get a certification, perhaps, before considering employment.

Kloosterman Decl. Exh. I (Davidsson Depo. 152:5-153:8) (emphasis added). Plaintiffs cannot

1 decertification by filing such conflicting declarations. Such tactical maneuvering should not be
 2 tolerated. Because the conflicting testimony calls the credibility of all declarants into question, all of
 3 Plaintiffs' declarations should be struck.

4 **B. The Timing Of The Declarations—*After* Defendants Filed Their Decertification**
 5 **Motions—Further Demonstrates That The Declarations Are Not Credible.**

6 Altering deposition testimony is especially disfavored where, as here, testimony was
 7 modified on the heels of the deponent being made aware of the deposition's shortcomings. In
 8 *Hambleton, supra*, 397 F.3d at 1224-1225, the Ninth Circuit rejected changes to deposition
 9 testimony where the changes were submitted *after* the other party filed a motion for summary
 10 judgment. *See also Laster v. T-Mobile USA, Inc.*, 2009 U.S. Dist. LEXIS 116228, *20-21 n.2 (S.D.
 11 Cal. 2009) ("a relevant consideration is the timing of corrections").

12 Here, the declarants waited until *after* Defendants filed their decertification motions
 13 to submit the conflicting written testimony. The deponents had ample opportunity to "correct" their
 14 deposition testimony. They could have changed their testimony during the depositions. They could
 15 have changed their testimony by making errata changes under Federal Rule of Evidence 30(b). They
 16 might even have attempted to submit a declaration prior to the close of discovery. Instead, it was not
 17 until after Defendants filed their decertification motion highlighting the deposition concessions that
 18 these individuals came forward with the conflicting testimony. This timing is highly suspect. This
 19 brazen attempt to rescue their claims through manipulation and rejection of prior, sworn deposition
 20 testimony should not be allowed.

21 **C. If Anything, The Inconsistent Testimony Demonstrates That Collective**
 22 **Certification Is Not Appropriate.**

23 As explained in Defendants' moving papers and reply briefs, inability to cross
 24 examine witnesses to refute inconsistent statements would result in a denial of due process. The
 25 inconsistencies in Plaintiffs' testimony warrant cross examination of each Plaintiff, which is not
 26 possible in a collective action. *See Hinojos v. Home Depot, Inc.*, 2006 U.S. Dist. LEXIS 95434 at
 27 *7-8 (D. Nev. Dec. 1, 2006) (denying plaintiffs' motion for conditional certification of off-the-clock
 28 claims, noting that "the Court is concerned about the contradictions between plaintiffs' declarations

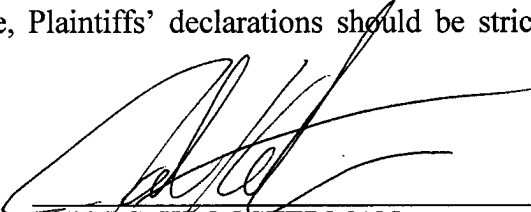
and their deposition testimony, which shows the importance of cross-examination of each plaintiff”); *Pacheco v. Boar’s Head Provisions Co.*, 671 F.Supp. 2d 957, 965-65 (W.D. Mich. 2009) (denying certification where there were “numerous inconsistencies between Plaintiffs’ affidavits and their deposition testimony,” finding the contradictions of peculiar concern “because they show[ed] ‘the importance of cross-examination of each plaintiff’ and suggest[ed] ‘the need for separate mini-trials to resolve each claim.’”); *Lugo v. Farmer’s Pride, Inc.*, 2010 U.S. Dist. LEXIS 88139 at *60 (E.D. Pa. Aug. 25, 2010) (granting decertification where “the testimony offered by plaintiffs in general is plagued by inconsistencies that diminish its reliability and ‘show the importance of cross-examination of each plaintiff.’”). Without opportunity to cross examine witnesses, Plaintiffs “could characterize their experiences without a realistic fear of direct rebuttal.” *Johnson v. BigLots Stores, Inc.*, 561 F.Supp.2d 567, 586 (E.D. La. 2008).

And this is exactly the situation here. Plaintiffs submitted various sworn declarations in 2006 and 2007. Some of those declarants gave conflicting sworn deposition testimony. 24 Hour then deposed 40 plaintiffs in 2010, all of whom have provided declarations, signed under penalty of perjury, containing testimony inconsistent with their sworn deposition testimony. Some of those inconsistent statements are based on the declarant later learning of new hearsay information. But the declarants do not say who provided the information or when they learned of it. Without the opportunity to cross examine each Plaintiff about their inconsistent testimony, 24 Hour is denied due process.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs’ declarations should be stricken in their entirety.

Dated: December 6, 2010



JOHN C. KLOOSTERMAN
LITTLER MENDELSON
A Professional Corporation
Attorneys for Defendants
24 HOUR FITNESS USA, INC. AND SPORT
AND FITNESS CLUBS OF AMERICA

Exhibit A

Gabe Beauperthuy

Decl. Paragraph	Conflicting Testimony	Notes
4	18:23-20:3	Testified that the GM <i>interviewed</i> him and then the DM interviewed him. In his declaration, claims that, although it seemed to be an interview, he would later learn that his real interview was the subsequent one with the DM.
36	36:23-37:4	Testified that although each silo may have had separate goals on paper, everyone had to contribute and everyone was doing someone else's job to help. In his declaration, now says that there was no way for him to step out of his role or duties because he was just there to sell.

Clifford Cotton

Decl. Paragraph	Conflicting Testimony	Notes
6, 7, 8	76:14-77:24	Testified that "Positions were different, so they varied with position, varied with club" and that it was easier to sell at Highlands Ranch compared to Broadmoor and Colorado Springs because the clientele demographics were different. Declaration now states that club differences made no difference in his job duties.
17	84:4-7	Testified that he understood his pay for <i>each training session</i> (with no mention of length) to be a flat rate. In his declaration he tries to say that he understood it to be a flat rate for an hour of the training session.
21	26:10-25	Testified that there wasn't a set schedule, just that he should be there if there "was business to be found." In his declaration states that he had to be in the club 8-8.

William Clunn

Decl. Paragraph	Conflicting Testimony	Notes
71	53:22-55:7	Testified that, although the goal was always to sell, the differences in the amenities and physical condition of the club affected his ability to do so. He claims in his declaration that there was no difference in his experience in the clubs based on such differences.
52	63:24-64:6	Testified that the tip that he would give his sales counselors was to be honest in their sales, and that this was a characteristic that made him a good salesperson. He claims in his declaration that he never provided any sales advice to FCs unless they asked.

Natalie Cromartie

Decl. Paragraph	Conflicting Testimony	Notes
9	32:3-17	Testified that she had one on one meetings with her GM as a fitness counselor and discussed production goals, including appointments, shows, closes, lead generations and EFT. In her declaration she tries to change her testimony by stating that she "would later learn that the GM was merely gathering my data and reporting this information to the DM, acting as an intermediary or facilitator."
11	29:4-30:1	Testified that when she was a fitness counselor and needed time off for illness or vacation, she would call her GM during the week and her AGM on the weekend, and her DM if she couldn't get ahold of them. In her declaration, she attempts to change her testimony by stating that she "would later find out that the GM was just an intermediary between the sales staff and the DM."

Seth Daniels

Decl. Paragraph	Conflicting Testimony	Notes
52	104:1-106:4	Testified that that he had paid time off days accumulated but "just didn't take it" because "I didn't know, like, what forms to fill out or how to get paid for it, so I just figured I'd get paid on it eventually, so . . ." States in his declaration that he was docked pay if he took a day off because he was sick while he was a manager.
75	63:23-64:9	Testified that trainers made their own hours and wrote their own schedule, but in his declaration says he would have testified differently had he been asked whether his job duties varied depending on when he worked.
77	124:5-17	Despite testifying "Q:As a general manager at 24 Hour Fitness, what was the highest amount of money you earned in a year? A. I can't really recall the highest amount I ever made. Q. Can you estimate? A. If I was going to estimate, I'd say 160,000. Q. And what was the average amount that you would make in a year as a general manager? A. The years I didn't make 160-, I made around a hundred." He claimed in the declaration that if he had been asked "when that could be" he would have testified differently and answered that he never earned more than \$100,000.

John Davidsson

Decl. Paragraph	Conflicting Testimony	Notes
88	101:13-22; 152:2- 154:12	Davidsson, who left 24 Hour in January 2005, submitted a declaration in 2006 stating that his job functions included "recruiting and training new personal trainers," yet in his deposition he testified he could not do these things. When confronted with the inconsistency at his deposition, he claimed that what he meant by recruiting was telling people who walked into the club that they could apply on-line. He claims now that his deposition testimony was consistent with his declaration because his authority was inherently limited because he said he was just a lead personal trainer.
89	37:15-38:4; 45:2-6; 54:19-56:2	Testified that the hours he worked were different from other trainers and that he worked free training sessions that were not common to all trainers. He attempts to modify his testimony in his declaration by claiming that if he had been asked whether this modified his duties or responsibilities, he would have said no.

Bobby DeSoto

Decl. Paragraph	Conflicting Testimony	Notes
53	74:16-75:24	Testified that he would interview candidates using the preset questions and also write his own notes about the person that he would pass on to the DM. He also testified that his DM would ask him what he thought about the candidate. In his declaration he claims that he did not interview candidates and only asked the standard set of questions and forwarded the answers to the DM.

Lawrence Dickerson

Decl. Paragraph	Conflicting Testimony	Notes
72	79:8-17	Testified that he served as both the OM and GM for several months. In his declaration, he says that this "is the exception that proved the rule" and that he was never asked whether this was the ordinary structure for club level managers.
74	131:22- 132:4	Testified that he completed employee reviews, including a rating which affected the employee's compensation. In his declaration, he attempts to modify his testimony by saying that he only did so when directed to by his DM and that it was not a regularly performed duty.

1 Anne Dillon

Decl. Paragraph	Conflicting Testimony	Notes
38	56:25-57:2; 62:2-10; 63:15-22; 65:9-66:1	Testified that as an OM she had to do all kids of paperwork. She gave a very detailed description of what was involved in banking: taking cash register tills and reconciling them, filing out a lot of paperwork, dealing with credit card slips, checks and money, filing out the banking slips and going to the bank. She testified that doing the banking took a couple of hours each day (and longer on Mondays and close-outs). She also testified that she had to reconcile member agreements every day to make sure they were correctly filled out. She also handled cancellation paperwork (Washington law provides for a 3-day cancellation window). In her declaration, she claims that she performed only clerical functions, "jotting 'i's and crossing 't's..."
12	88:2-90:23	Testified that she would conduct first round group interviews with her GM and FM and pass along the information to her DM. She also participated in second round interviews. In her declaration, she claims that this was not her normal experience and that if she had been asked how frequently the interviews occurred she would have said that they occurred infrequently and that her DM didn't take anything she said into serious consideration.
40	97:14-98:2, 98:23-99:6	Testified that her DOM was inconsistent. If the club's numbers started to fall, she'd be at the club more, if the numbers were good she wouldn't visit much at all, and instead they would just talk on the phone maybe once a day, or sometimes just exchange voicemails. In her declaration, she claims that she wasn't asked what effect the frequency of DM visits had on her role or duties, and that if she had been asked she would have explained they were the same.

18 Toni Fiedler

Decl. Paragraph	Conflicting Testimony	Notes
28	122:12- 124:12	Testified that she would fill out evaluation forms for her employees and that she would discuss with her DM her observations about the employee's strengths and weaknesses, whether they need more training, what their job expectations were, and they'd fill out the comments section based on that. Fiedler would then sit down with the employee and go over the review with him or her. Fiedler now claims in her declaration that her DM would "tell me what to write down for the 'evaluation' portion of the form" failing to mention that the comments were based on a discussion of Fiedler's observations of the strengths and weaknesses of the employee.
54	48:24-50:17	Testified that her duties with respect to banking were "the No. 1 priority." In her declaration, she states that her primary duty was ensuring that the club was clean.
54(h)	53:17-54:3;	Testified that she reviewed the timesheets of the operations

1	56:13-23	employees to ensure they corresponded to the scheduled hours and that she would be aware of it if an employee worked extra hours over what they were scheduled. She testified that she made sure that the timesheets were signed and there was nothing missing on the timesheet - if there was, she would tell them that they needed to correct it. In her declaration, she claims that, at most, she "perused it to see that the numbers on the timesheet matched the posted schedule..."
---	----------	--

Tina Flores

7	Decl. Paragraph	Conflicting Testimony	Notes
8	26	22:6-23:7	Testified that for a period, GMs had supervisory authority over OMs and supervised the entire club. Around 2000 that changed on paper, but it did not really change in practice. It didn't change in practice until around 2002 or 2003. In her declaration she states that all club-level managers were co-equal and the only deviation was early on in her career when the DM position was vacant.
12	49	81:16-83:18	Testified that she selected applicants based on her criteria (good penmanship), called applicants for a group interview, interviewed them and then told her DM which applicants she liked and asked the DM to interview just those applicants. She claims in her declaration that she only did what her DM told her to do.
15	51	105:15-106:8	Testified that there was a productions side and an operations side, and that this changed over her career. She claims in her declaration that she is not aware of a shift from two silos to three silos.

Garth Gelker

17	Decl. Paragraph	Conflicting Testimony	Notes
18	14, 99	96:11-20	Testified that larger facilities made it easier for him to make sales goals. He attempts to modify his testimony by stating in his declaration that his duties and work were the same regardless of physical club differences, and that the only difference was in his paycheck.

Adam Grubbs

23	Decl. Paragraph	Conflicting Testimony	Notes
24	6	26:16-31:13	Testified that he was hired as a FC by the GM and FM who interviewed him for around an hour, the OM gave him the application, and the GM offered him the job. He attempts to modify his testimony by stating that he "would later learn that it was the DM who had actually hired me."
27	19	176:3-177:10	He testified that a list of tasks including GMS cleanup was a guide for what he needed to do most days as a GM, but attempts to state in his declaration that it was something that could be done very rarely

		and not a typical duty for him.
45	121:1-122:2	Testified that he would tell his DM his impressions of potential new hires he met with, and that he DM would ask him about his meeting with the potential new hire. He attempts to change his testimony by stating that the "DM seemed mainly to care about the written down answers to the preset questions. I don't believe he took my thoughts on whether the candidate was nice or presentable into consideration."

Victoria Hadipour

Decl. Paragraph	Conflicting Testimony	Notes
70	124:1-125:17	Testified that earlier in her career with 24 Hour Fitness she had to process manual documents, which took longer. Attempts to modify her testimony in her declaration by stating that "just because paperwork took me longer before certain computer programs were implemented, did not change my duties."
71	27:12-14; 54:16-23; 69:8-70:6	Testified that training her OM's was her specialty as a DOM, but that as an OM she was given a manual and told that she would sink or swim. She attempts to modify her testimony in her declaration by stating that "whether an OM had training by a DOM or by shadowing another OM or whether he or she had to learn the job like I did, all that affect was the stress level of the first few months of the position...like any company, some were better at the jobs than others, but that did not change the job duties that all performed."

Shane Hedani

Decl. Paragraph	Conflicting Testimony	Notes
105	75:16-76:6	In his deposition, he was asked if he was responsible for dividing up fit hours and if anyone complained to him that they should be given more fit hours; he did not mention fit-hour distribution affecting pressure to work off the clock. In his declaration he now states "I was never asked at my deposition whether the way fit hours were distributed affected the pressure to work off the clock. If I had been asked directly, I would have answered truthfully that they did not."

Cory Hennessy

Decl. Paragraph	Conflicting Testimony	Notes
25	183:13-15	Testified that, with respect to meeting with applicants and asking them the SeleXpert questions, "you could kind of consider that an interview." Now claims in his declaration that this was not an interview.
14	143:21-144:11	Testified that the assistant operations manager reported to him when he was operations manager. Now claims in his declaration that "The 'manager' did not have real management authority or real administrative responsibility."

25	185: 4-8	When asked in his deposition what types of positions he had a role in hiring, he testified "I could say I had a role in all of them." Now claims in his declaration that "I did not have any authority on who to hire."
----	----------	---

Kelly Hillenbrand

Decl. Paragraph	Conflicting Testimony	Notes
89	81: 4-10	Testified that she switched to Operations Manager because she "was tired of production and all the yucky stuff that came with it. So I thought that maybe it would be different on the other side." Now claims that "Had I been asked at my deposition, I would have answered [that my motivation in switching to operations manager did not affect my job duties]."
41, 42	126:16-127:20	Testified that it was up to her and her Assistant Operations Manager to hire, but her Supervisors had to make sure candidates were the right fit "as well." Now claims in her declaration that the decision to hire a candidate was solely up to the DM and Human Resources Dept.
41-42	130:4-19	Testified that she admits that in her December 2006 declaration she stated "I was given the authority to hire." Now claims in her declaration that the decision to hire a candidate was solely up to the DM and Human Resources Dept.

Michelle Janke

Decl. Paragraph	Conflicting Testimony	Notes
9, 27, 29, 37	70:9-15	Testified that the Assistant Operations Manager reported to her. Now claims in her declaration that she had no managerial authority whatsoever.
9, 19-20	36:23-37:2; 121:15-122:16	In her deposition, when asked how many employees she supervised when she became a club operations manager, she said "five to ten people" and testified that she had new employees review manuals and shadow other employees. She kept a board in her office listing what the new employee had to do each day. Now claims in her declaration that she had infrequent participation in training and no real management authority.

Brent Johnson

Decl. Paragraph	Conflicting Testimony	Notes
38	103:4-105:4	Testified that he would review applications and select individuals for interviews based on their job history and schedule. He would sometimes have the front desk supervisor do the initial interview, and then he would do the secondary interview, and sometimes he would do the initial interview. Regardless of whether he did the first or second interview, he had the final say on hiring as long as it followed the pay scale guidelines. He now claims in his declaration that "24

		Hour's attorneys never asked me why I was able to hire or how frequently I "hired." Had they done so, I would have explained that my DM delegated that authority to me. I also would have told them that in terms of hiring, I did not participate in that process customarily or regularly."
13	145: 19-25	Testified that he gave advice to employees about how to improve, without first seeking DM approval. Now claims in his declaration that if he ever trained employees, it was at the direction of a District Manager.

David Kaipi

Decl. Paragraph	Conflicting Testimony	Notes
16	44:14-16	When asked in his deposition if, in his job interview, he was told he would be overseeing other employees, he responded "I think that would be a definition of manager." Now claims in his declaration that his job was not to oversee the other trainers.

Quinton Kaplan

Decl. Paragraph	Conflicting Testimony	Notes
15	88:11-16	In his deposition, when asked if he told District Operations Manager, Bill, what he thought of the applicants based on his interactions with them, he testified "it might have happened." Now claims in his declaration that, regarding hiring, "I do not recall my DM asking for recommendations from me, and I do not recall providing any."
29, 39	101:5-10	Testified that could count on him dropping by the Kids' Club "every day" to "oversee operations." Now states in his declaration that he did not direct others' work; that non-managerial duties comprised 90% of his work.

Belton Lubas

Decl. Paragraph	Conflicting Testimony	Notes
76	152:25-154:7	Testified that, while employed at a pre-sale location, he sold memberships and there were no trainers. In his declaration he now claims that "24 Hour claims that my duties were different at the pre-sale location because I sold memberships and there were no trainers . . . I was never asked about it, and had I been I would have answered that my main responsibilities as an FM were the same at any other club location."
43, 45	129:11-17	Testified that while a fitness manager, he gave formal performance reviews to trainers once per month. Now states that he did not mentor any trainers who wanted to get promoted; his only discipline authority was to report a violation.

Cindy Magnani

Decl. Paragraph	Conflicting Testimony	Notes
34, 52	35:17-21	In her deposition, when asked if she would set a written schedule for the sales team when she was the sales manager, she said "usually . . . yeah." Now claims in her declaration that I didn't do very much when it came to scheduling employees . . . I did not have the ability to change the schedule or decide to make up a schedule whenever I wanted."
29	37:24-38:7	In her deposition, when asked if she gave supervisor information on whether she personally thought the person would be a "good fit for your sales team," she said "yeah, I would have to say, I wouldn't want this person, or they seemed kind of like they wouldn't fit in, because it would benefit me." In her declaration, she now claims that she had minimal involvement with the hiring process; "it's true that occasionally, I would let the DM know if I thought the person might be a credible salesperson."

Michael Marino

Decl. Paragraph	Conflicting Testimony	Notes
83	183:21-185:16; 211:4-213:6	Testified that he suggested typing up a written warning if a trainer was failing to meet production goals. He would meet the employee with a witness and then send documentation to his DM or to HR. When the master appointment book contained entries that "didn't look right" he turned the matters over to loss prevention and as a result, two trainers in different clubs were terminated. In his declaration he now claims "I was not asked how often [I was able to discipline employees] while I was there. If I had been, I would have explained that it did not happen customarily or regularly, it was on an ad hoc basis, when and how directed by my DM."

Richard McGrath

Decl. Paragraph	Conflicting Testimony	Notes
35	58:23-59:1	Testified that he got paid his full salary regardless of the number of hours he worked. Now claims in his declaration that "During my deposition when I was asked if I was paid my full salary regardless of the number of hours I worked, I answered "yes. . . . However, I was never asked what would happen if I worked less than 40 hours. Had I been asked this question, I would have answered that I believed if I worked less than 40 hours, then I would not have received my full base pay."

Megan Olsen

Decl. Paragraph	Conflicting Testimony	Notes
72, 76	96:13-16; 97:7-25	Testified that "If we wanted to, we could choose a specific person" to assign agreements to. If more than one trainer felt they should have had a particular new client, she said "we gave the clients to who we felt that they went to. And if they had a problem, they could talk to the district fitness manager." Now claims in her declaration that "I did not direct the work of others"; Managers did not have independent judgment or discretion.

Louis Ortiz

Decl. Paragraph	Conflicting Testimony	Notes
37-38	56:10-20	Testified that no one told him he needed to work more hours off the clock than the hours he was scheduled to work. He was only told if employees choose to work off the clock they will not be compensated. Now claims in his declaration that "It was the culture of 24 Hour Fitness for any employee, whether a FM, FC or a PT, to work as much as needed in order to hit your goals."
43, 44	77:19-78:5	In his deposition, he admitted he was part of the interview process; says the district managers wanted him to give them an idea of whether the candidates were well-groomed, in good shape, and presented themselves well – their "first impression." In his declaration he now claims that he did not offer any input to the DM as to whether he thought a candidate interviewed well or would make a good employee; did not have any authority to offer input or decide who should be hired.

Joeleen Palmeri

Decl. Paragraph	Conflicting Testimony	Notes
33	86:20-87:19	Testified that she gave her DM information that contained notes on questions when she met with applicants. Now claims in her declaration that she does not recall writing down any subjective opinions on the applicants.
46	122:15-20	Testified that the DM visited "not too often...maybe once a week or every two weeks, estimate." Now claims in her declaration that DMs and area fitness directors made in person visits "at least" once per week or once every two weeks,

1 Carmen Pieske

Decl. Paragraph	Conflicting Testimony	Notes
49	115:17-117:16	Testified that she "was very vocal" about how her staff performed and that she believes people were promoted based on this. In her declaration, she claims that she was never asked how frequently that occurred and that she would have testified that it was not regular and that it was less frequent than once a week or even month.
52	54:18-55:3	Testified that "things changed a lot" with respect to specific duties during the time she was an OM. IN her declaration, claims that in her depo she was referring to the change in paperwork not the change in the OM position

8 Alfred Ra'Oof

Decl. Paragraph	Conflicting Testimony	Notes
111	135:17-136:18	Testified that his previous experience made him a better salesperson. In his declaration, he states that while he did state at his depo that his previous experience may have made him a better salesperson, he was not asked whether this changed his job duties and had he been asked he would have said he had the same job duties as other GMs.

14 Patricia Rangasajo-Drake

Decl. Paragraph	Conflicting Testimony	Notes
28	167:21-169:23	Testified that she investigated employees and checked their performance, and spent several hours each month doing so. In her declaration, she claims that she never had to perform a detailed investigation into whether someone was doing their job well and would only give information on someone's performance to the DM when asked.
22	160:21-162:25	Testified that she would provide feedback to her DM after meeting with an applicant and would give her impression of what the applicant was like in person including whether they answered the questions well. She stated that she believed her input as to whether she wanted to hire them wasn't given much weight because the DM made the decision. In her declaration, she now claims she didn't actually provide an opinion of whether the person should be hired.
63	88:19-90:17	Testified that the Hawaii clubs were "left alone a lot." In her declaration, she states that while she did state at her depo that the Hawaii clubs were "left alone a lot," this did not change her daily role or duties.

Matthew Reiter

Decl. Paragraph	Conflicting Testimony	Notes
58	76:2-13	Testified that he wanted to be a FM because he wanted to teach other trainers how to train. In his declaration, he states that while he did state at his depo that he wanted to be a FM because he just wanted to teach other trainers how to train, what he actually meant was that he wanted to lead them by example and did not have authority to teach them to train.
85	153:15-20	Testified that he was paid the same salary no matter how many hours he worked. He now claims in his declaration that while he did state at his depo that he was paid the same salary amount no matter how many hours he worked, what he actually meant was that he was paid the same amount as long as he worked over 40 hours per week

Bonnie Rinta

Decl. Paragraph	Conflicting Testimony	Notes
64	122:17-128:10	Testified that, while she worked at a pre-sale location she was the only manager and sold training sessions normally sold by a trainer or FM and did paperwork normally done by an OM. In her declaration, she claims that being the only club-level manager did not affect her job duties.
66	44:14-22; 47:25-48:7	Testified that no one told her to prospect for new clients off the clock and said that it was her impression of how to be successful. She claims that she actually meant that working off the clock was expected and implied by the DMs.

Chad Ruf

Decl. Paragraph	Conflicting Testimony	Notes
98	96:16-23, 99:4-19	Testified that when he worked in a pre-sale location he worked out of a double-wide trailer; potential members donned construction hats and toured the construction site rather than the club. In his declaration, he claims that this did not change his duties.
99, 102	88:13-89:6	Testified that, because he had previously been a DFM, when he was a FM the DFM essentially said "whoa, he's been a district manager so we'll leave him alone" and that "they kind of left me alone in the club." In his declaration, he claims that it was because he hit his goals and that he was not able to exercise any more discretion than anyone else and that he did not function any more independently than any other FM.

Dennis Sciacca

Decl. Paragraph	Conflicting Testimony	Notes
59	120:5-10; 124:18-22; 169:9-23	Testified that he asked candidates specific questions and sent the responses to his DM. The questions included ones that asked for Sciacca's subjective input on the interviewee's attributes, such as, "determine whether [the interviewee] can effectively demonstrate his ability to motivate others" and "listen for rapport and ability to put others at ease." His DM would ask him questions about the applicant and he indicated whether he thought the applicant had the ability to put others at ease and build rapport. In his declaration he claims that he was never asked whether he used subjective criteria or whether there were company rules for responding. Notably, he does not claim that he did not use subjective criteria or that there were any such rules.

Harley Spencer

Decl. Paragraph	Conflicting Testimony	Notes
78	32:1-10	Testified that his FM never told him to record less hours than he actually worked. In his declaration, he claims that doing so was the only way to keep his job and that he would not be compensated for unscheduled time he worked.
66	46:13-18	Testified that the demographics of certain clubs made it harder to sell. In his declaration he claims that working at one club is the like working at any other.
52	76:18-77:17	Testified that he disciplined a trainer who did not meet sales goals, and had to handle the termination and deliver the termination paperwork from Human Resources. In his declaration he claims that this was all at the request of the DM and that he told the employee only what the DM told him to say, although at his deposition he couldn't recall the conversation with specificity and never said he told the employee what his DM told him to.

Lawrence Srubas

Decl. Paragraph	Conflicting Testimony	Notes
38	52:5-19; 53:25-54:9	Testified that whether or not he got paid for all of his FIT Hours depended on who his FM was at the time. Under FM Tony Kuo, he claimed he was only paid for his FIT Orientations but not other non-session hours. However, when Eric Hood took over as FM after Kuo was terminated, "the payment structure was more equitable" and he was paid for all of the non-session hours for which he was scheduled. This continued under subsequent managers. His declaration now states that he does not know if they were making those decisions themselves or if the DM was making them.
39	79:8-81:15	Testified that when his FM told him he could not be in uniform

		prospecting clients at the club unless he was on the clock, he began to prospect for clients on his own time while working out at the club. He now claims that his FM told him he had to work off the clock.
40	69:19-70:15	Testified that he after the time and labor system was implemented, he clocked in when he arrived and clocked out when he left or when his shift was over and that he was paid for all hours for which he was clocked in. He now claims in his declaration that he really meant that he sometimes kept working after he clocked out.

Maika Symmonds

Decl. Paragraph	Conflicting Testimony	Notes
5	19:19-20:19	Testified only that when he applied for a position at 24 Hour Fitness, he initially met with the GM and then met with DM. He now claims that he would later learn that the GM was asking him pre-printed questions and would deliver his answers to the DM, that the GM had no say on whether he was hired, and that he received an "actual interview" with the DM based only on the answers to the pre-printed questions.
10	24:22-25:8	Testified that he logged 40 hours a week although he "may have worked more." He claims in his declaration that he "most likely worked more."
65	49:12-51:4	Testified that he believed that he would be docked pay for working less than 40 hours a week, but could not recall it ever happening and could only recall an instance in which 24 Hour Fitness overpaid him and he had to pay it back. In his declaration he states that it is not true that he received the same fixed salary no matter how little he worked and that if he missed work without PTO that time would be deducted from his pay.

Connie Wusterbarth

Decl. Paragraph	Conflicting Testimony	Notes
16	21:17-22:25	Testified that she interviewed with the GM or the DM and could not recall which. In her declaration, she now claims that she interviewed with the DM.
72	35:20-22	Testified that she trained 7-10 customers a day. In her declaration, she now states that the number of customers she had versus another trainer did not change her main duties.
59	111:1-18	Testified that she received the same amount of salary no matter how few or how many hours she worked as a FM. In her declaration, she now claims that if a club-level manager had no accumulated paid leave and needed to take time off, he or she would lose the salary for that time off.

Stephanie Yamada

Decl. Paragraph	Conflicting Testimony	Notes
64	85:11-86:9	Testified that she would show her employees the manuals and training guides and they would go over them with her. She would also do a club orientation for a new employee, sometimes from another silo. In her declaration, she now states that anyone could have done these duties and that she did not consider performing the orientation to be training.
65	88:22-89:22	Testified that she gave performance evaluations to the employees in Operations. She assisted in putting them together by reviewing production reports and submitting the information to the DOM who formalized the review and sent it to corporate. She sometimes later would go over the review and any raise with the employee. In her declaration, she now claims that it was not her responsibility to give evaluations and that she did not discuss pay raises with them.

Firmwide:99009883.1 034670.1216